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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 RUSSO BAILEY,

12 Plaintiff,

13 v.

14 D. ROOT; D. HOLLISTER; WILLIAM  
15 LANDSDOWNE, CITY OF SAN DIEGO,  
16 STAR TOWING, DEPARTMENT OF  
17 MOTOR VEHICLES FOR THE STATE  
18 OF CALIFORNIA, 5 UNKNOWN POLICE  
19 DEPUTIES,

20 Defendants.

Case No. 10cv0367 BTM(CAB)

**ORDER GRANTING MOTION TO  
DISMISS COMPLAINT AND  
DENYING MOTION FOR  
SANCTIONS**

21 The City of San Diego (the "City") has filed a motion to dismiss Plaintiff's Complaint  
22 for failure to state a claim. Plaintiff Russo Bailey ("Plaintiff"), proceeding pro se, has filed  
23 motion for sanctions against the City. For the reasons discussed below, the City's motion  
24 to dismiss is **GRANTED**, and Plaintiff's motion for sanctions is **DENIED**.  
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26 **I. FACTUAL BACKGROUND**

27 Plaintiff commenced this action on February 16, 2010.

28 Plaintiff's Complaint arises out of two incidents during which (1) Plaintiff was issued  
a Notice to Appear by San Diego police officers for operating a motorcycle without having  
a proper motorcycle license or endorsement; and (2) the police officers took possession of

1 Plaintiff's motorcycle and had it towed away by Star Towing.

2 The first incident took place on July 1, 2006, and was the subject of a lawsuit Plaintiff  
3 filed in 2007 against defendants Hollister, Landsdowne, the City of San Diego, Star Towing,  
4 the DMV, and others. (Bailey v. Hollister, et al., 07cv2243 JM(NLS)).

5 The second incident took place on September 7, 2009.

6 Plaintiff's Complaint sets forth six "causes of action" and seven "claims for relief."  
7 Construing the Complaint liberally, Plaintiff's legal claims can be reduced to the following:  
8 (1) a claim under 42 U.S.C. § 1983 for false arrest; (2) a claim under 42 U.S.C. § 1983 for  
9 unlawful seizure of property and violation of his due process rights; (3) a claim under 42  
10 U.S.C. § 1983 for excessive force; (4) a Monell claim against the City; (5) a claim for violation  
11 of 42 U.S.C. §§ 1985, 1986; (6) violation of various California Penal Code provisions; and  
12 (7) violation of the California Constitution.

## 13 14 II. STANDARD

15 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted  
16 only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to  
17 support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th  
18 Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in plaintiff's  
19 complaint are taken as true and construed in the light most favorable to the plaintiff. See  
20 Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although  
21 detailed factual allegations are not required, factual allegations "must be enough to raise a  
22 right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct.  
23 1955, 1965 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to  
24 relief' requires more than labels and conclusions, and a formulaic recitation of the elements  
25 of a cause of action will not do." Id. "[W]here the well-pleaded facts do not permit the court  
26 to infer more than the mere possibility of misconduct, the complaint has alleged - but it has  
27 not show[n] that the pleader is entitled to relief." Ashcroft v. Iqbal, \_\_ U.S. \_\_, 129 S.Ct.  
28 1937, 1950 (2009) (internal quotation marks omitted).

### 1 III. DISCUSSION

#### 2 A. Motion to Dismiss

3 The City contends that Plaintiff's Complaint should be dismissed for failure to state  
4 a claim. Upon review of the Complaint, the Court agrees with the City.

5 To the extent Plaintiff's claims are based on the July 1, 2006 incident, Plaintiff's claims  
6 are barred under the doctrine of res judicata. "Res judicata" encompasses both claim  
7 preclusion and issue preclusion. Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 2171  
8 (2008). Under the doctrine of claim preclusion, a final judgment forecloses "successive  
9 litigation of the very same claim, whether or not relitigation of the claim raises the same  
10 issues as the earlier suit." New Hampshire v. Maine, 532 U.S. 742, 748 (2001). For  
11 purposes of claim preclusion, "identity of claims" exists when two suits arise from "the same  
12 transactional nucleus of facts." Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708,  
13 714 (9th Cir. 2001). Issue preclusion, in contrast, bars "successive litigation of an issue of  
14 fact or law actually litigated and resolved in a valid court determination essential to the prior  
15 judgment." New Hampshire, 532 U.S. at 748-49.

16 In Bailey v. Hollister, et al., 07cv2243 JM(NLS), Plaintiff sued Hollister, Landsdowne,  
17 the City of San Diego, Star Towing, the DMV, and others for violating his civil rights in  
18 connection with the July 1, 2006 incident. Plaintiff's claims against the DMV were dismissed  
19 without prejudice on grounds of sovereign immunity. (Doc. No. 3.) In an order filed on  
20 November 3, 2008, Judge Miller granted summary judgment in favor of the City defendants  
21 on Plaintiff's Monell claim and Plaintiff's claims for false arrest, use of excessive force,  
22 unlawful deprivation of property, and violation of 42 U.S.C. § 1986. Final judgment was  
23 entered on December 11, 2008.

24 In this case, Plaintiff makes almost identical claims against Hollister, Landsdowne, the  
25 City of San Diego, and Star Towing based on the July 1, 2006 incident. These claims are  
26 barred by the doctrine of res judicata and are dismissed with prejudice.

27 Furthermore, Plaintiff's claims based on the July 1, 2006 incident are time-barred.  
28 The applicable limitations period is two years. Carpinteria Valley Farms, Ltd. v. County of

1 Santa Barbara, 344 F.3d 822, 828 (9th Cir. 2003); Cal. Civ. Proc. Code § 335.1. At the time  
 2 Plaintiff filed his prior suit on June 25, 2007, almost half of the limitations period had run (359  
 3 days). The statute of limitations was tolled until, at the latest, January 10, 2009 (the last day  
 4 for filing an appeal from the December 11, 2008 judgment). The remaining 371 days of the  
 5 limitations period expired on January 16, 2010. Therefore, Plaintiff's Complaint, which is  
 6 dated February 11, 2010, and was filed on February 16, 2010, was untimely.

7 Plaintiff's claims based on the September 7, 2009 incident also fail. Plaintiff alleges  
 8 false arrest in connection with the September 7, 2009 incident. However, it appears from  
 9 the allegations of the Complaint that Plaintiff's false arrest claim is barred by Heck v.  
 10 Humphrey, 512 U.S. 477 (1994). In Heck, the Supreme Court held that a section 1983 claim  
 11 must be dismissed if a judgment in favor of the plaintiff would necessarily "imply the invalidity  
 12 of his conviction or sentence" and the conviction has not been reversed, expunged,  
 13 or called into question by issuance of a writ of habeas corpus. Id. at 486-87. Plaintiff alleges  
 14 that he was found guilty of the Vehicle Code violations for which he was cited. (Compl. ¶¶  
 15 18-19.) Plaintiff's false arrest claim necessarily implies that his conviction was invalid. See  
 16 Cabrera v. City of Huntington Park, 159 F.3d 374, 380 (9th Cir. 1998). Plaintiff does not  
 17 allege that his conviction was expunged or otherwise set aside. Therefore, the Court  
 18 dismisses this claim but grants Plaintiff leave to amend his Complaint to plead any facts that  
 19 would show that his false arrest claim is not barred by Heck.<sup>1</sup>

20 As in his prior case, Plaintiff alleges that he was "vehicle jacked" and "robbed of  
 21 property." The Complaint itself does not contain factual allegations explaining how he was  
 22 deprived of his vehicle. However, it appears that Plaintiff is complaining about the towing  
 23 of his vehicle after he was issued the Notice to Appear for operating a motorcycle without  
 24 a valid driver's license or endorsement in violation of Cal. Veh. Code § 12500(b). The  
 25 doctrine of issue preclusion bars this claim because Plaintiff litigated this exact same issue  
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27 <sup>1</sup> Plaintiff may also be attempting to sue under 42 U.S.C. § 1983 for improper delay  
 28 in his arraignment and violation of his right to a speedy trial. (Compl. ¶ 19.) However, this  
 claim would also imply the validity of his conviction and would be Heck-barred. See Byrd v.  
Teater, 2008 WL 958194 (E.D. Cal. 2008).

1 against the City in Plaintiff's prior case. Judge Miller granted summary judgment in favor of  
 2 the City defendants on Plaintiff's claim for unlawful deprivation of property. Judge Miller  
 3 pointed out that Cal. Veh. Code § 22651(p) permits a peace officer to remove a vehicle after  
 4 issuing the driver a notice to appear for a violation of § 12500, and held that the seizure of  
 5 a vehicle pursuant to this provision does not violate due process. (Doc. Nos. 50, 78.) See  
 6 also Mohammed El v. Opdyke, 2004 WL 1465692, at \* 3 (N.D. Cal. June 23, 2004) (holding  
 7 that an officer did not commit a constitutional violation by refusing to allow plaintiff access  
 8 to his vehicle pursuant to Cal. Veh. Code § 22651(p).) Accordingly, the Court dismisses this  
 9 claim.

10 Plaintiff uses the words "assault" and "excessive force" in his Complaint (Compl. ¶¶  
 11 25, 27), but does not set forth any facts regarding the use of force against him during the  
 12 September 7, 2009 incident. Therefore, this claim is also dismissed.

13 Plaintiff's Monell claim fails because Plaintiff has not stated a claim for a constitutional  
 14 violation.

15 Plaintiff alleges that unknown police deputies witnessed civil rights violations against  
 16 him and made no attempt to prevent those violations in contravention of 42 U.S.C. § 1986.  
 17 Section 1986 provides: "Every person who, having knowledge that any of the wrongs  
 18 conspired to be done, *and mentioned in section 1985 of this title*, are about to be committed,  
 19 and having power to prevent or aid in preventing the commission of the same, neglects or  
 20 refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his  
 21 legal representatives, for all damages caused by such wrongful act . . . ." (Emphasis added.)

22 It appears that Plaintiff alleges a violation of § 1985(3), which provides a cause of  
 23 action where "two or more persons in any State or Territory conspire or go in disguise on the  
 24 highway or on the premises of another, for the purpose of depriving, either directly or  
 25 indirectly, any person or class of persons of the equal protection of the laws, or of equal  
 26 privileges and immunities under the laws." Racial or some other class-based animus is an  
 27 essential requirement of a claim under the first clause of § 1985(3). Griffin v Breckenridge,  
 28 403 U.S. 88 (1971). "To establish racial or class-based animus, a plaintiff must show

1 ‘invidiously discriminatory motivation . . . behind the conspirators’ action.” Usher v. City of  
 2 Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (quoting Griffin, 403 U.S. at 102).

3 The Complaint does not contain any factual allegations showing that Defendants  
 4 discriminated against Plaintiff based on race or membership in a class. Therefore, Plaintiff’s  
 5 § 1986 claim is dismissed.

6 Plaintiff alleges violations of miscellaneous California criminal statutes including Penal  
 7 Code 211 (robbery), Penal Code 213 (robbery; degrees), Penal Code 209 (kidnapping),  
 8 Penal Code § 825 (appearance before magistrate); Penal Code § 1049.5 (trial date; felony  
 9 cases); and Penal Code § 686 (defendants’ rights). However, these statutory provisions do  
 10 not provide for civil enforcement. Therefore, Plaintiff lacks standing to sue for their violation.  
 11 See Ellis v. City of San Diego, 176 F.3d 1183, 1189 (1999) (holding that district court  
 12 properly dismissed claims brought under the California Penal Code because the code  
 13 sections did not create enforceable individual rights).

14 In Paragraph 31 of the Complaint, Plaintiff alleges that the California Constitution was  
 15 violated. However, Plaintiff does not specify what provision of the California Constitution was  
 16 violated and how it was violated. The only specific provision of the California Constitution  
 17 Plaintiff mentions in the Complaint is Article 1, § 15, which provides that a defendant in a  
 18 criminal case “has the right to a speedy public trial.” (Compl. ¶ 19.) However, it appears  
 19 that there is no tort cause of action for the violation of this constitutional provision. See  
 20 Walker v. County of Santa Clara, 2005 WL 2437037 (N.D. Cal. 2005); Reinhardt v. Santa  
 21 Clara County, 2006 WL 662741 (N.D. Cal. 2006). Plaintiff cites to Cal. Civil Code § 52.1,  
 22 which authorizes a civil action in the case where a “person or persons . . . interferes by  
 23 threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion,  
 24 with the exercise or enjoyment by any individual or individuals of rights secured by the  
 25 Constitution or laws of the United States, or of the rights secured by the Constitution or laws  
 26 of this state . . . .” However, § 52.1 requires “an attempted or completed act of interference  
 27 with a legal right, accompanied by a form of coercion.” Jones v. Kmart Corp., 17 Cal. 4th  
 28 329, 334 (1998). Plaintiff’s Complaint does not allege any coercion in connection with the

1 alleged violation of his speedy trial rights. Therefore, Plaintiff has not stated a claim for  
 2 violation of his right to a speedy trial or any other right guaranteed by the California  
 3 Constitution.

4 All of Plaintiff's claims against the DMV are barred by the Eleventh Amendment,  
 5 which prohibits suits against a state or its agencies or departments for legal or equitable  
 6 relief. Papasan v. Allain, 478 U.S. 265, 276 (1986). "The state of California has not waived  
 7 its Eleventh Amendment immunity with respect to claims brought under § 1983 in federal  
 8 court, and the Supreme Court has held that § 1983 was not intended to abrogate a State's  
 9 Eleventh Amendment immunity." Dittman v. California, 191 F.3d 1020, 1025-26 (9th Cir.  
 10 1999) (internal quotation marks and citations omitted). Accordingly, Plaintiff's claims against  
 11 the DMV are dismissed with prejudice.

12 Finally, Plaintiff's claims against Police Chief William Lansdowne are dismissed for  
 13 the additional reason that they rest upon the theory of respondeat superior. (Compl. ¶ 32.)  
 14 Respondeat superior is not a viable theory of liability in § 1983 cases. Monell v. New York  
 15 City Dep't of Social Servs., 436 U.S. 658, 694 (1978).

#### 16 17 **B. Motion for Sanctions**

18 In opposition to the City's motion to dismiss, Plaintiff filed a motion for Rule 11  
 19 sanctions. Plaintiff contends that the City filed the motion to dismiss in bad faith and for  
 20 purposes of harassment.

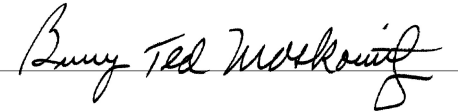
21 Plaintiff's motion for sanctions is denied. Plaintiff did not comply with Rule 11's "safe  
 22 harbor" requirement, which provides that a party seeking sanctions must give the opposing  
 23 party 21 days after service of the motion to "withdraw or appropriately correct[ ]" the  
 24 challenged paper, claim, defense, contention, or denial." The safe harbor provision is strictly  
 25 enforced. Holgate v. Baldwin, 425 F.3d 671, 678 (9th Cir. 2005). Because Plaintiff did not  
 26 comply with the safe harbor provision, Plaintiff's motion for sanctions is denied. Plaintiff's  
 27 motion is also denied because he has failed to establish that the City brought the motion for  
 28 any improper purpose.

1 **IV. CONCLUSION**

2 For the reasons discussed above, the City's motion to dismiss is **GRANTED**.  
3 Plaintiff's claims against Defendants based on the July 1, 2006 incident are **DISMISSED**  
4 **WITH PREJUDICE**. All of Plaintiff's claims against the DMV are **DISMISSED WITH**  
5 **PREJUDICE**. Plaintiff's claims based on the September 7, 2009 incident are **DISMISSED**  
6 with leave to amend. Plaintiff may file an amended complaint correcting the deficiencies  
7 noted above on or before July 29, 2010. Failure to do so will result in the closing of this  
8 case.

9 **IT IS SO ORDERED.**

10 DATED: July 14, 2010

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13 Honorable Barry Ted Moskowitz  
14 United States District Judge  
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